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SERVICE DATE - JUNE 9, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32645

BIG STONE-GRANT INDUSTRIAL DEVELOPMENT AND
TRANSPORTATION, L.L.C.—CONSTRUCTION EXEMPTION—
ORTONVILLE, MN AND BIG STONE CITY, SD

Finance Docket No. 32645 (Sub-No. 1)²

BIG STONE-GRANT INDUSTRIAL DEVELOPMENT AND
TRANSPORTATION, L.L.C.—PETITION UNDER 49 U.S.C. 10901(d)

Decided: May 29, 1998

In Big Stone-Grant Industrial Development and Transportation, L.L.C.—Construction Exemption—Ortonville, MN and Big Stone City, SD, Finance Docket No. 32645 (ICC served Sept. 26, 1995) (September 26 decision), Big Stone-Grant Industrial Development and Transportation, L.L.C. (Big Stone), was granted a conditional exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10901 to construct approximately 2 miles of track in the vicinity of Ortonville, MN, and Big Stone City, SD.

The September 26 decision stated that, upon completion of the environmental review, a further decision would be issued addressing the environmental impacts of the proposal and, if appropriate, making the exemption effective at that time. The decision also stated that action on the related petition in Finance Docket No. 32645 (Sub-No. 1), seeking issuance of a certificate of public convenience and necessity authorizing the proposed construction to cross main line tracks of the

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board) effective on January 1, 1996. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10502 and 10901.

² These proceedings are not consolidated. A single decision is being issued for administrative convenience.

Burlington Northern Railroad Company (BN),³ must await a final decision authorizing the construction. A petition to reopen and revoke the conditional grant was filed by John D. Fitzgerald, for and on behalf of United Transportation Union, General Committee of Adjustment (Fitzgerald), and Big Stone replied. On March 25, 1998, in light of adverse court decisions involving the proposal, Big Stone requested leave to withdraw both the petition for construction authority and the petition requesting crossing authority and to vacate the September 26 decision. Fitzgerald has replied to this request.

According to Big Stone, on December 5, 1997, the United States Court of Appeals for the Eighth Circuit affirmed without opinion a Minnesota District Court decision declaring that Big Stone would tortiously interfere with two existing contracts between BN and a local operator, if Big Stone sought to build, and arranged for operations over, its rail line.⁴ Big Stone submits that, because it did not seek further appeal, any attempt to pursue the rail construction project, as proposed, could subject it to further litigation and claims for damages from BN. Accordingly, stating that the proposed project is no longer feasible, Big Stone seeks to withdraw the construction and crossing petitions, and requests that the September 26 decision conditionally granting the construction exemption be vacated without prejudice to its right to obtain approval for any other construction project that Big Stone may pursue in the same region in the future.

In its reply, Fitzgerald opposes the withdrawal request, contending that granting it would be prejudicial to the interests of employees. Notwithstanding his pending petition to reopen and revoke the conditional grant, Fitzgerald objects to our vacating the prior decision which conditionally exempted the proposed construction. Fitzgerald argues that, because the pending proceeding is subject to the law in effect prior to the ICCTA, we now have the discretion, under former 49 U.S.C. 10901(e), to include labor protective conditions in any construction proposal. However, if the withdrawal request is granted and Big Stone files a new construction proposal, Fitzgerald submits that any such new proposal would be governed by the current 49 U.S.C. 10901, which does not include discretionary labor protective provisions. Rather than granting the withdrawal request, Fitzgerald contends that we should require Big Stone to amend its present pleading, subject to an appropriate supplemental filing fee, when a new construction proposal is developed.

Fitzgerald's position is without merit. Any exemption authority that we may have granted in this proceeding would have only been permissive in nature, and Big Stone could have chosen not to consummate the proposal at any time. Accordingly, because Big Stone has presented valid reasons in support of its position, it should be allowed to withdraw such a permissive action without

³ As a result of the merger of The Atchison, Topeka and Santa Fe Railway Company into BN on December 31, 1996, BN is now The Burlington Northern and Santa Fe Railway Company. For the purposes of this decision, we will continue to refer to this entity as BN.

⁴ State of Minn. by Burlington Northern R. Co. v. Big Stone-Grant Indus. Development and Transp., L.L.C., 131 F.3d 144 (8th Cir. 1997) (Table).

prejudice. Fitzgerald's alternative is not a valid option. Any future filing will be a new construction proposal. A prior conditional grant, based on a different proposal, would be meaningless. Accordingly, the motion to withdraw the petitions and vacate the prior decision will be granted, without prejudice.

It is ordered:

1. Big Stone's request to withdraw the construction and crossing petitions is granted, without prejudice.
2. The decision served September 26, 1995, conditionally granting the construction exemption, is vacated. Fitzgerald's pending petition to reopen and revoke the conditional grant is denied as moot.
3. The proceedings are dismissed.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary